No. 760

In the
Supreme Court of the United States

NEWTON SAMUEL LOCKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF.

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In the

Supreme Court of the United States

NEWTON SAMUEL LOCKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Now comes, Newton Samuel Locke, hereinafter called Petitioner, and applies for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, to review a judgment entered in said Court on March 5, 1948, affirming a judgment against Petitioner, entered in the United States District Court for the Northern District of Texas, Dallas Division, on July 19, 1947, and in support thereof, respectfully represents:

STATEMENT OF THE CASE

An indictment was returned on May 16, 1947, in the United States District Court for the Northern District of

Texas, Dallas Division, against Petitioner, containing ten counts. (Tr. pp. 1-20.) Counts 1, 3, and 5 charged Petitioner with attempting to evade and defeat his individual income tax for the years 1942, 1943 and 1944, respectively, by filing or causing to be filed false and fraudulent returns and by concealing and attempting to conceal from the Collector and the proper officers of the United States the true amount of his net income and the sources thereof. Counts 2, 4 and 6 charged the Petitioner, in similar allegations, with filing false and fraudulent returns for his wife, Lotsie E. Locke, for said years of 1942, 1943 and 1944. Count 7 charged Petitioner wilfully attempted to evade and defeat Declared Value Excess Profits Tax and Excess Profits Tax of A. A. A. Air Conditioning and Manufacturing Corporation of Texas for the fiscal year ended April 30, 1943, by filing and causing to be filed a false and fraudulent return, and concealing and attempting to conceal its net income and the sources thereof. Count 8 charged a similar offense with respect to the tax and return of A. A. A. Air Conditioning and Manufacturing Corporation of Texas for the fiscal year ended April 30, 1944. Count 9 charged a similar offense with respect to A. A. A. Roofing Corporation of Texas for the fiscal year ended January 31, 1943. Count 10 charges a similar offense with respect to A. A. A. Plumbing Corporation of Texas for the fiscal year ended April 30, 1943.

The case was tried to a jury, and Petitioner was found guilty on all counts. (Tr. p. 39.) He was sentenced, under the first six counts, to five years imprisonment and to pay a fine of $25,000.00; under the last four counts he was

sentenced to serve another five years imprisonment with the sentence on the last four counts to run consecutively with the sentence under the first six counts. (Tr. pp. 980-984.)

The record of testimony is very voluminous, and a full statement thereof would unduly enlarge this petition. The necessary and pertinent facts germane to the questions presented herein, are hereafter stated in connection with the discussion of the reasons relied on for allowance of the Writ.

STATEMENT AS TO JURISDICTION

Jurisdiction is invoked under Section 240(a) of the Judicial Code, as amended. (28 U. S. C. A., Section 347-a.) The opinion of the Circuit Court of Appeals was filed on March 5, 1948. Petition for rehearing was filed on March 22, 1948, and was denied on March 31, 1948.

QUESTIONS PRESENTED

In its opinion the Circuit Court of Appeals, Fifth Circuit, after setting out its findings of fact, gives meager discussion to the issues raised on appeal, and in fact directs specific consideration to only one of Petitioner's points on appeal, the other issues being disposed of in general terms without particularizing the legal questions involved. The points on appeal challenging the correctness of the trial court's charge to the jury are passsed upon collectively with the sweeping determination that the charge of the trial court covered fully and fairly every essential phase of the case and that the written charges requested by petitioner

and refused by the trial court were either erroneous, or were contained in substance in other charges given. (Tr. p. 1003.)

On the record of the case herewith presented it is the earnest insistence of petitioner that the Circuit Court of Appeals erred in affirming the judgment of the trial court, because of

1. The refusal of the trial court to charge the jury that the indictment was not evidence of petitioner's guilt, after due and timely request for such charge.

2. The inadequacy of the trial court's charge on "wilfulness," and the failure of the trial court to charge on "specific intent."

3. The admission by the trial court, over petitioner's objection, of prejudicial and irrelevant testimony unrelated to issues of the case.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The opinion of the Circuit Court of Appeals, Fifth Circuit, in the instant case is in direct conflict with the decision of the Circuit Court of Appeals, Third Circuit, in the case of *U. S. v. Schanerman, 150 F. (2d) 941*, and also is in conflict with the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of *Cooper v. U. S., 9 F. (2d) 216.*

The Circuit Court of Appeals, Fifth Circuit, in its opinion in the instant case, has so far departed from the accepted and established standards for judicial proceedings and has sanctioned such a departure by the lower court as to require and call forth this Court's power of supervision

and revision, to the end that uniformity of decision be obtained, and that well settled principles of judicial procedure and safeguards long established as essential to a fair trial, be not broken down.

1. At the trial in the lower court, Petitioner presented and filed his Requested Charge No. 1 to the effect that the indictment was not evidence of a defendant's guilt, and that the jury should not allow themselves to be influenced by reason of the returning of the indictment. This charge was refused by the Court. (Tr. pp. 31-32.) Nowhere in its charge did the trial court give any instructions to the jury that the indictment was not evidence of guilt, but on the contrary, in its charge, referred the jury to the indictment for "specific figures" in the following language:

"In the indictment upon which defendant is being tried, are found specific figures setting forth the amount of defendant's default, or shortage." (Tr. p. 970.)

The refusal of the trial court to give this Requested Charge No. 1 was excepted to after the giving of the main charge, and was one of the points urged by Petitioner on appeal to the Circuit Court of Appeals. (Tr. p. 990.)

It is submitted that the Requested Charge should have been given by the Court, particularly in view of the added stress given to the indictment by the Court's reference thereto as above quoted.

2. In the trial court Petitioner filed his Requested Charge No. 3 upon the subject of specific intent and circumstantial evidence, which charge was not submitted to the jury by the trial court (Tr. pp. 32-33), except in part, and then upon the subject of wilfulness. (Tr. p. 970.) In the main charge the Court instructed the jury in effect that where a person know-

ingly does not report all his income, the criminal intent follows as a matter of law, using the following language:

" 'The presumption is that a person intends the natural consequences of his acts, and the natural presumption would be, if a person consciously, knowingly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.' (Tr. p. 969.) Further, the Court instructed the jury:

" 'When an act is wilfully done may not always be proved by direct evidence. It may often be inferred from the conduct of the parties, taking into consideration that the normal mind must realize the probable consequences of his act. Wilfulness may be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act. This may be inferred from the direct evidence of the several acts and general conduct of the parties." (Tr. p. 970.)

The failure of the Court to give Requested Charge No. 3 in the form requested was excepted to after the giving of the main charge (Tr. p. 974), and assigned as a point on appeal. (Tr. p. 990.)

Petitioner urges that the charge on "wilfulness" is insufficient and the failure to charge on "specific intent" erroneous, in a case, such as the one at bar, in which "wilfulness" and "specific intent" are essential ingredients.

3. A large proportion of the printed record is taken up with evidence adduced by the government, over petitioner's objection, from witnesses who at one time or another were officers and directors of various corporations brought into the case, as to the signing of minutes of directors' and stockholders' meetings of the corporations directly involved in the counts of the in-

dictment, as well as other corporations, not named therein, as will be seen from the testimony of the following witnesses: Naomi Cotton (Tr. pp. 166, 170); Gray I. Thomas (Tr. pp. 191, 196, 200, 201); Grover Ellis (Tr. pp. 287, 306); Marion Boynton (Tr. pp. 336, 340); Joe S. Pickard (Tr. pp. 360, 361); Mrs. A. L. Higgins (Tr. pp. 390, 404); Louis N. Locke (Tr. pp. 465, 471); Frank M. Stokes (Tr. pp. 537, 541); C. B. Locke, Jr. (Tr. pp. 627, 629); C. W. Stice (Tr. pp. 693, 699).

The line of questioning pursued by Government counsel consisted of exhibiting the minute book of the corporation inquired about to the witness, thumbing same page by page, and where witness' name appeared signed to the minutes of a meeting, the witness was quizzed as to whether he signed the minutes of the particular meeting, whether he attended the meeting, whether such meeting was actually held, and at whose instance the witness had signed the minutes. None of the minutes about which these various witnesses were interrogated are shown to throw any light on, or have any relevancy to, the issues involved in the charges against Petitioner.

Also, a considerable portion of the testimony presented by the government, over Petitioner's objection, related to corporations other than those involved in the charges. Defendant was not charged with any offense involving A. A. A. Oil Corporation, A. A. A. Petroleum Corporation, or A. A. A. Building Corporation. All of the testimony of the witness L. Roy McKinnon (Tr. pp. 615 and 653) is taken up with the payments under a drilling contract entered into by A. A. A. Oil Corporation and A. A. A. Petroleum Cor-

poration, and Andrew A. Bradford, with M. B. K. Drilling Company, in an evident attempt by Governmental counsel to show an attempted evasion of the income tax of the A. A. A. Oil Corporation and A. A. A. Petroleum Corporation, though defendant was not so charged with respect to these corporations. In this connection the same line of questioning as to the signing of corporate minutes, as previously noted, was indulged in, the witnesses Gray I. Thomas (Tr. p. 197), Grover Ellis (Tr. p. 294) and Mrs. A. L. Higgins (Tr. p. 399) being interrogated as to their signing minutes of the A. A. A. Oil Corporation and A. A. A. Petroleum Corporation, and in addition, the witness, Grover Ellis (Tr. pp. 292, 294) was interrogated concerning minutes of A. A. A. Building Corporation. Then Government counsel was permitted to show by the witness Gray I. Thomas that he never signed the charter of A. A. A. Petroleum Corporation where his name appeared as an incorporator thereof (Tr. p. 197); and to show by the witness Grover Ellis that he never signed the charter of A. A. A. Oil Corporation where his name appeared thereon. (Tr. p. 298.)

Further, over petitioner's objection the government was permitted to show the employment of Eastus & Jones, United States attorneys at the time of employment, as attorneys for the corporations. Government counsel were permitted to elicit from the witness, C. W. Stice, that these attorneys were carried on the rolls of the A. A. A. Air Conditioning and Manufacturing Corporation of Texas, also the official position held by them as United States Attorney and Assistant United States Attorney, respectively, also

the amount of fees paid these attorneys, and further that petitioner told witness "he thought it money well spent for protection". (Tr. pp. 665, 667.) The witness, C. W. Lawrence was permitted to testify as to conversation with petitioner regarding the employment of Eastus & Jones. (Tr. pp. 105, 106.)

Nothing was shown that indicated in any way that the employment of Eastus & Jones had anything to do with the matters charged against petitioner.

The action of the lower court in admitting this testimony was the basis of petitioner's Points on Appeal Nos. 15, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30. (Tr. pp. 991, 992, 993.)

Petitioner submits that this mass of testimony unrelated to the issues of the case, so admitted by the trial court, was wholly irrelevent and highly prejudicial.

CONCLUSION

The opinion of the United States Circuit Court of Appeals, Fifth Circuit, does not specifically discuss the matters herein assigned for the allowance of the Writ of Certiorari, though such points were raised and argued before it, and fully presented in the record of the case accompanying this petition. The effect of such opinion is to sanction the rulings and action of the trial court in—

(a) Refusing to charge the jury that the indictment was not evidence of guilt, after due request for such charge;

(b) Inadequately charging the jury on "wilfulness", and failing to charge on "specific intent";

(c) Admitting the irrelevent and prejudicial testimony hereinabove set out;

which rulings and action of the trial court as heretofore asserted are contrary to the principles of law and established judicial precedent, applicable to the case, as petitioner verily believes. On these grounds, and for the reasons heretofore stated, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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SUPPORTING BRIEF

SUBJECT INDEX

No.....

In the

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NEWTON SAMUEL LOCKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPORTING BRIEF

To the Honorable, the Supreme Court of the United States:

REFERENCE TO OPINION OF CIRCUIT COURT OF APPEALS

The opinion of the Circuit Court of Appeals, Fifth Circuit, in the appeal of Newton Samuel Locke, appellant, versus United States of America, appellee, appears in the Transcript of the Record. (Tr. pp. 999-1003.)

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under Section 240(a) of the Judicial Code *(28 U. S. C. A., Section 347-a)*. The opinion of the Circuit Court of Appeals, Fifth Circuit, was filed on March 5th, 1948. Petition for rehearing was filed on March 22, 1948, and denied on March 31, 1948.

STATEMENT OF THE CASE

The statement made in the Petition for Writ of Certiorari, in support of which this brief is presented, as part of the statement of the case, is here adopted, and is not restated to avoid repetition. Hereafter, in the argument such further facts will be stated as may be pertinent to the issues under consideration.

SPECIFICATIONS OF ERROR

1. The Circuit Court of Appeals, Fifth Circuit, erred in affirming the action of the trial court, refusing to charge the jury that the indictment was not evidence of the guilt of petitioner, in the face of petitioner's due and timely request for such charge.

2. The Circuit Court of Appeals, Fifth Circuit, erred in affirming the action of the trial court, in giving an inadequate charge on "wilfulness" and in failing to charge on "specific intent", as requested by petitioner.

3. The Circuit Court of Appeals, Fifth Circuit, erred in affirming the action of the trial court in admitting, over petitioner's objections, irrelevant and prejudicial testimony.

Argument

1. The request of Petitioner that the jury be charged the indictment was not evidence of Petitioner's guilt and that the jury should not allow themselves to be influenced by the fact an indictment had been returned against him, was duly presented in writing to the trial court and re-

fused by it (Tr. pp. 31-32); and after the delivery of the main charge to the jury, the omission of the requested charge therefrom was duly excepted to, (Tr. p. 974) and was preserved and argued as a point on appeal, (Tr. p. 990) and was further pressed upon the Circuit Court of Appeals, Fifth Circuit, in the petition for re-hearing. (Tr. pp. 1005-1006.) The error of the trial court in refusing this requested charge is rendered more glaring in view of the probative effect ascribed to the allegations of the indictment by the court in its main charge, which instructed the jury:

> "In the indictment upon which defendant is being tried, are found specific figures setting forth the amount of defendant's default, or shortage." (Tr. p. 970.)

It is noted that no modifying or restrictive words are used in bringing these allegations of the indictment to the attention of the jury. The court did not tell the jury they were merely alleged matters, but instructed them in unqualified terms that the "specific figures" in the indictment set forth "the amount of defendant's default, or shortage". The use of this affirmative language, unmodified in any way, could have no other effect than to impress upon the jury that the indictment was evidence of the "specific figures" and "amount of defendant's default, or shortage." Nothing in the charge of the trial court can be found that either directly or indirectly had the effect of instructing the jury to disregard the allegations of the indictment as evidence in the case.

There can be no doubt that the opinion and judgment of the Circuit Court of Appeals, Fifth Circuit, in the instant case is in direct conflict with the opinion of the Circuit Court of Appeals, Third Circuit, in the case of *U. S. v. Schanerman, 150 F. (2d) 941*, and is further in direct conflict with the opinion of the Circuit Court of Appeals, Eighth Circuit, in the case of *Cooper v. U. S., 9 F. (2d) 216.*

In the case of *U. S. v. Schanerman, 150 F. (2d) 941*, supra, the Circuit Court of Appeals, Third Circuit, held:

> "When requested so to do, as in the instant case, the District Court, in clear, unmistakable words, should have charged the jury that the finding of an indictment is not evidence of the guilt of the accused".

The opinion of the Circuit Court of Appeals, Eighth Circuit, in *Cooper v. U. S., 9 F. (2d) 216*, makes this holding:

> "Defendant's first request was the following: 'The court instructs the jury that the indictment in this case is of itself a mere formal accusation or charge against the defendant, and is not of itself to be considered as evidence of the guilt of the defendants, and no juror should suffer himself to be influenced in the slightest degree by the fact that an indictment has been returned against the defendant.'
>
> "This instruction was refused, and the charge contained nothing to the same effect. The omission would not constitute reversible error in the absence of a request; but, when requested, such an instruction should be given."

To like effect are the following authorities:

Nanfito v. U. S. (Eighth Cir.), 20 F. (2d) 376;
Gold v. U. S. (Third Cir.), 102 F. (2d) 350.

Petitioner having duly presented his request in writing for the trial court to charge the jury that the indictment was not evidence of guilt, and that the jury should not allow themselves to be influenced by the fact that an indictment had been returned against him, it was manifestly error for the trial court to refuse to deliver the requested charge to the jury, and further error on the part of the Circuit Court of Appeals, Fifth Circuit, in affirming this action of the trial court. Petitioner urges that the conflicts between the opinion of the Circuit Court of Appeals, Fifth Circuit, in the instant case on the one hand, and the Circuit Court of Appeals, Third Circuit, in the case of *U. S. v. Schanerman*, *supra*, and the Circuit Court of Appeals, Eighth Circuit, in the case of *Cooper v. U. S. supra*, on the other hand, call for a review on the part of the Supreme Court to the end that a decisive determination of this important question of judicial proceeding may be promulgated, and the conflict in the divergent opinions be resolved and settled by an authoritative and uniform rule on the subject.

2. The statute defining the offense charged against petitioner applied to "any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter", etc. *Sec. 145(b) U. S. C. A.* In those cases where the gravamen of the offense is the wilful doing of an act, it has been repeatedly held that a specific motive, purpose or intent to accomplish that which the statute condemns is an

essential or constituent element of the crime. In the case of *Screws v. U. S., 325 U. S. 91*, the Supreme Court said:

> "We recently pointed out *(Spies v. U. S., 317 U. S. 492)* that the word 'wilful' is a word of many meanings and denotes an act which is intentional rather than accidental. But when used in a criminal statute it generally means an act done with a bad purpose. In that event something more is required than the doing of the act prescribed by the statute. An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime. And that issue must be submitted to the jury under appropriate instructions".

In all criminal cases a defendant is entitled to have the jury given a full statement of the law applicable to his case, and neglect on the part of the trial court is sufficient grounds for reversal.

Bogileno v. U. S., 38 F. (2d) 584;
Reynolds v. U. S., 48 F. (2d) 762;
U. S. v. Levy, 153 F. (2d) 995;
U. S. v. Noble, 155 F. (2d) 315;
U. S. v. Max, 156 F. (2d) 13.

This requires that the "essential elements" of the crime charged against the defendant be submitted to the jury.

U. S. v. Noble, 155 F. (2d) 315, supra.

As further said by the Supreme Court in the case of *Screws v. U. S., 325 U. S. 91, supra:*

> "The difficulty here is that this question of intent was not submitted to the jury with proper instructions. The court charged that petitioners acted illegally if they applied more force than was necessary to make the arrest effectual or to protect themselves

from the prisoner's alleged assault. But in view of our construction of the word 'wilfully', the jury should have been further instructed that it is not sufficient that petitioners had a generally bad purpose. To convict it was necessary for them to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e. g., the right of trial by a court rather than by ordeal".

It is earnestly contended by petitioner that the trial court did not in the charge, submit the question of specific intent or motive as laid down in the authorities. The charge on "wilfulness" was incomplete in that it did not clearly inform the jury that in order to convict it was necessary for them to find that petitioner had the intent or purpose to commit the particular offense of which he was charged. An inspection of the Court's charge will show no instruction to this effect. (Tr. pp. 964-973.)

Petitioner's Requested Charge No. 3, in part read "Specific intent on defendant's part is an essential ingredient of the office and must be proved. It may be proved by circumstantial evidence" etc. (Tr. p. 32.) The court embraced part of this requested charge in his instructions to the jury, but omitted the quoted portion thereof. It follows that the charge of the trial court is insufficient on the subject of "wilfulness", and inadequate in that no instruction was given on "specific" intent or motive. This resulted, no doubt, from the failure of the trial court to distinguish between the intentional doing of an act, and the wilful doing of same, since he charged the jury:

"The presumption is that a person intends the natural consequences of his acts and the natural presumption would be, if a person consciously, knowing-

ly, or intentionally did not set up his income and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax." (Tr. p. 969.)

As pointed out in the case of *Hargroves v. U. S., 67 F. (2d) 820*, a person may purposely commit an act and yet be innocent of criminal intent. No presumptions or inferences of intent to evade or defeat the tax flow from an omission of income from a return. *DeLane v. C. I. R., 100 F. (2d) 507; Griffiths v. C. I. R., 50 F. (2d) 782.* Since "wilfulness" is an essential element of the offense charged against petitioner, which required not only proof that petitioner had intentionally, and not by accident or inadvertance, committed the acts alleged in the indictment, but also that he committed same with the intent, purpose and motive of doing the very things denounced by the statute, *Spies v. U. S., 317 U. S. 492*, it follows that the rule as to presumptions so stated by the trial court, would not apply in the instant case. Inadequate or improper directions to a jury are as fatal as no instructions at all. *Fisher v. U. S., 328 U. S. 462; Hendrey v. U. S., 233 F. 5.*

The failure of the trial court to adequately and properly instruct the jury as to "wilfulness", and its failure to specifically instruct on the subject of intent was duly excepted to (Tr. p. 974) and assigned as point on appeal. (Tr. p. 990).

It is clear, petitioner feels, that the inadequacy of the charge, in the respects pointed out, tended to mislead the jury, and did not clearly distinguish and illuminate to the jury the essential elements of the offense, which were required to exist, before a conviction could be found against

petitioner; and that the error of the trial court in this respect, and the error of the Circuit Court of Appeals, Fifth Circuit, affirming the action of the trial court, call for a reversal of this case.

3. The irrelevant and prejudicial evidence admitted by the trial court, over the objections of petitioner, was doubtless admitted on the view that it tended to show "intent" and "system" on the part of petitioner. As will be observed from an inspection of the whole record, the prosecution was permitted to roam far afield in adducing its testimony, and the testimony against which petitioner complains, goes far beyond the bounds prescribed, and limits allowed, in proving "intent" or a "systematic course of dealing". The testimony of the witness, Naomi Cotton (Tr. pp. 166, 170); Gray I. Thomas (Tr. pp. 191, 196, 200, 201); Grover Ellis (Tr. pp. 287, 306); Marion Boynton (Tr. pp. 336, 340); Joe S. Pickard (Tr. pp. 360, 361); Mrs. A. L. Higgins (Tr. pp. 390, 404); Louis N. Locke (Tr. pp. 465, 471); Frank M. Stokes (Tr. pp. 537, 541); C. B. Locke, Jr., (Tr. pp. 627, 629); C. W. Stice (Tr. pp. 693, 699); with reference to corporate minutes of directors' and stockholders' meetings signed by them, and the mass of detail elicited from these witnesses as to whether the meeting represented by each minute was actually held; whether witness attended the meeting, and why witness signed each minute inquired about, had no connection with the charges against petitioner. None of these minutes were shown to have any bearing upon the income or deductions of the corporations involved, and the minutes inquired about were not read to the jury, and the purpose seemed solely to show the

corporations were officered by "stooges", a word frequently used by Government counsel; that meetings of directors and stockholders were not actually held; that the minutes were prepared by petitioner and that the witnesses signed at petitioner's request. There was nothing in this line of testimony to throw any light on the issue of petitioner's guilt or innocence of the charges made by the indictment. If anything, it served only to exhibit irregularities in the internal conduct of the corporations, wholly unrelated to any matters affecting the income or deductions thereof. The effect was simply to allow a mass of unrelated testimony to go to the jury that was highly prejudicial and operated to becloud the real issues before the jury and create false issues not in the case.

Unless the employment of Eastus & Jones, who at the time were United States Attorney and Assistant United States Attorney, respectively, had some relation or connection with the charges against petitioner, it is patent that the evidence, admitted over petitioner's objection, with reference thereto, in which the fees paid, as well as the official position then occupied by these attorneys, were brought out in detail (Tr. pp. 665-667) was improper, and the court was clearly in error in so admitting such testimony. No connection whatever was shown between the employment of these attorneys and any of the acts charged against petitioner.

Also, the evidence admitted over the objection of petitioner that Gray I. Thomas did not sign the charter of A. A. A. Petroleum Corporation where his name appeared as an incorporator thereof (Tr. p. 197), and that Grover

Ellis did not sign the charter of A. A. A. Oil Corporation where his name appeared thereon (Tr. p. 298) was clearly irrelevent and highly prejudicial. Neither the petroleum corporation, nor the oil corporation, were named in any of the counts of the indictment. This character of testimony had the object only of disparaging the defendant by casting a charge or suspicion that he forged the names of the witnesses to the charters mentioned. It is readily apparent that this character of evidence was neither relevant nor material to any fact issue involved in the charges against defendant and was highly prejudicial to the defendant and calculated to mislead the jury.

It is fundamental that a person charged with crime is entitled to be tried on the merits of the charge against him. Evidence that he has committed other crimes, or has been guilty of other irregularities, which has no tendency to prove any material fact in connection with the crime charged, except to show that the defendant possibly has a criminal disposition, is inadmissible. It would ordinarily be excluded by the rule which forbids the prosecution to give evidence of the defendant's bad character unless the defendant has first raised this issue; but evidence of other acts and offenses is still more prejudicial than ordinary reputation-evidence would be, and much more likely to lead the jury astray from the question of the defendant's guilt of the particular charge on trial, and to cause the jury to convict the defendant on "general principles." See *Fish v. U. S., 215 F. 545, 549, Gordon v. U. S., 254 F. 53; McDonald v. U. S., 264 F. 733; Paris v. U. S., 260 F. 529; Boyd v. U. S., 143 U. S. 454; 12 S. Ct. 292; 35 L. Ed. 1077;*

Hall v. U. S., 150 U. S. 76; 14 S. Ct. 22; 37 L. Ed. 1003; Farkas v. U. S., 2 F. (2d) 644; Weil v. U. S., 2 F. (2d) 145.

There is no sanction for the idea that a defendant's propensity generally to commit crime, or to act with irregularity in business transactions, or oven to commit offenses similar to the one with which he is charged, can be put in evidence to prove him guilty of the particular offense for which he is standing trial. To come within any of the exceptions to the general rule that proof of other offenses or irregularities are not admissible, the evidence offered must show some real connection between the extraneous crime or irregularities and the offense charged against the defendant. *Fish v. U. S., 215 F. 551.*

Due exception was taken to the action of the trial court in admitting the testimony of the witnesses named with respect to the matters above discussed, and such exceptions were preserved as points on appeal and urged before the Circuit Court of Appeals. (Tr. pp. 991, 992, 993.)

It is earnestly insisted that the character and line of testimony adduced from the witnesses mentioned in the particulars herein complained of was clearly inadmissible, highly prejudicial and detrimental to petitioner, and violative of the procedure and standards appropriate for criminal trials in the Federal Court. It is submitted that in considering this petition for Writ of Certiorari the question is not whether guilt may be spelt out of the record, but whether guilt has been found by a jury conformable to the principles of procedure and standards established for the fair trial of those accused of crime. *Ballenbach v. U. S., 66 S. Ct. 402.*

CONCLUSION

For all of the grounds and reasons heretofore stated, petitioner says that his Petition for Writ of Certiorari to the Circuit Court of Appeals, Fifth Circuit, to review the judgment of said Court in affirming the judgment against petitioner entered in the United States Court for the Northern District of Texas, Dallas Division, is well supported in law and in fact and ought to be allowed.

Respectfully submitted,

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INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 760

NEWTON SAMUEL LOCKE, *Petitioner*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 998-1001) is reported in 166 F. 2d 449.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 5, 1948. (R. 1002.) Rehearing was denied on March 31, 1948. (R. 1008.) The petition for a writ of certiorari was filed on April

22, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury as to wilfulness.

2. Whether the admission of certain evidence constituted prejudicial error.

3. Whether the general charge covered petitioner's request for an instruction as to the probative effect of the indictment.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 145. PENALTIES.
>
> * * * * * * * *
>
> (b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,

be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * * *

(26 U. S. C. 1940 ed., Sec. 145.)

STATEMENT

The petitioner was indicted on May 16, 1947, in the Northern District of Texas on ten separate counts. (R. 1-20). The first, third and fifth counts charged that he wilfully attempted to evade and defeat substantial amounts of his individual tax liabilities for the calendar years 1942, 1943 and 1944, respectively. (R. 1-3, 5-7, 9-11.) The second, fourth and sixth counts charged him with the wilfully attempted evasion of a substantial amount of taxes owing by his wife, Lotsie E. Locke, for the same respective calendar years. (R. 3-5, 7-9, 11-13.) The seventh and eighth counts charged that the petitioner wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Air conditioning and Manufacturing Corporation of Texas for the fiscal years ended April 30, 1943, and April 30, 1944, respectively. (R. 13-16.) The ninth count charged that the petitioner wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Roofing Corporation of Texas for the fiscal year ended January 31, 1943. (R. 17-18). The tenth count charged that he wilfully attempted to evade and defeat a large part of the taxes owing by the A A A Plumbing Corpora-

tion of Texas for the fiscal year ended April 30, 1943. (R. 18-20.)[1]

The petitioner was convicted by a jury on all counts (R. 39) and was thereafter sentenced as follows: on the first six counts—five years' imprisonment and a fine of $25,000; on the last four counts—

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[1] The indictment charges that the petitioner caused net income and taxes to be understated as follows:

Year	Taxpayer	Understatement of Net Income	Understatement of Tax
1942	Newton Samuel Locke	$ 37,503.97	$ 27,273.83
1942	Lotsie E. Locke	37,503.96	27,273.83
1943	Newton Samuel Locke	16,268.42	8,244.98
1943	Lotsie E. Locke	16,268.41	8,244.98
1944	Newton Samuel Locke	60,582.94	38,171.16
1944	Lotsie E. Locke	60,582.95	38,281.34
Fiscal year ended 4/30/43	A A A Air Conditioning and Manufacturing Corp. of Texas	216,138.81	174,195.11
Fiscal year ended 4/30/44	A A A Air Conditioning and Manufacturing Corp. of Texas	259,006.05	94,044.63
Fiscal year ended 1/31/43	A A A Roofing Corporation of Texas	133,114.18	108,938.28
Fiscal year ended 4/30/43	A A A Plumbing Corporation of Texas	39,155.80	31,324.64
Total		$876,125.49	$555,992.78

five years' imprisonment, consecutive with respect to the sentence imposed on the first six counts (R. 984). The court indicated that upon payment of the tax or a substantial part thereof, it would consider a "petition, or an application to probate the last five years" (R. 984). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed (R. 1002). A petition for rehearing was denied (R. 1008).

The evidence showed that the petitioner, a man of wealth and enterprise, acquired in the year 1940 a one-half interest in a corporation later known as the A A A Air Conditioning and Manufacturing Corporation of Texas. Later, he formed a number of other purported corporations, and an alleged partnership and trust. These subsidiary corporations and companies were supposedly formed for the purpose of meeting competition and minimizing corporate tax liability, and were known as the A A A Roofing Corporation, A A A Plumbing Corporation, A A A Building Corporation, A A A Engineering Corporation, and the A A A Finance Company, a partnership. The petitioner filled the key positions of these newly formed corporations with dummy stockholders and puppets, including relatives and minor employees who received only meager salaries, and had no authority or responsibility commensurate with their positions. The petitioner soon bought out the owner of the other fifty per cent interest in the various A A A enter-

prises, and thereafter they were at all times subject to his complete domination and control. Under his direction, they made substantial profits in subcontracting building and construction work on army bases during World War II.

The evidence showed that the petitioner, during this period, in order to conceal his true income for tax purposes, resorted to various schemes and subterfuges. He made his twenty-one year old nephew a co-partner in his A A A Finance Company. The nephew received a small salary, performed only minor clerical and bookkeeping duties, and never received any of the profits. The petitioner, nevertheless, reported one-half of the partnership income and profits as that of his nephew and alleged co-partner. He and his wife also established the N. S. Locke Trust No. 1, purporting to be an irrevocable trust in favor of his wife and niece. He transferred the A A A Building Corporation stock and building to this trust. Thereafter, he sold the building for $54,000 and pocketed the proceeds, later giving one-half to his wife. He never reported this amount received as a taxable dividend, and later dissolved the trust, giving the niece ten dollars as her share.

The petitioner paid his employees a fictitious bonus for the purpose of concealing his taxable income by padding the books with a deductible expense item. He drew corporation checks in large sums payable to his employees, designating them

as bonus salary. At his direction, the employees immediately endorsed the checks in blank and returned them to the company, after which they were run through the company's bank account. The petitioner then had his employees report the amount of the fictitious bonus as their individual income, and the company then paid the amount of tax due thereon for them, after which the entire bonus was set up on the books of the company as a deductible expense from taxable income. The employees were advised that stock or bonds would be issued to them in the amount of the unpaid bonus, but neither the stock nor the bonus was ever delivered to them.

The petitioner also was shown to have reported taxable income for a high tax year to be that of the prior low tax year. He would report directors meetings of his alleged corporations which were never held, and thereupon write fictitious minutes of the purported meetings which he would later have signed by the corporation officers who were supposed to have attended them. The petitioner was shown to have expressed the hope that his books "got scrambled up to where nobody could ever tell anything about them." In each of these instances, as the court below stated, "he was shown to be acting as *alter ego,* or in fact, the corporation itself." (R. 999-1000.)

ARGUMENT

I

The trial court properly instructed the jury as to the requisite element of wilfulness. The charge was carefully drawn[2] and in all respects meets the test enunciated by this Court in *United States* v. *Murdock,* 290 U. S. 389.

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[2] The court charged that the "gist of the offense charged in the indictment is wilful attempt * * * to evade or defeat the tax imposed by law * * * by purposely failing to report all the income which he knew he had * * *." The attempt "must be made with the intent to keep from the Government a tax imposed by the law * * *;" it "must be wilful, that is, intentionally done with the intent that the Government should be defrauded * * *." (R. 969.) The court further stated that "in determining the guilt of the Defendant, the wilfulness of the act becomes important;" that wilfulness "may not always be proved by direct evidence" and "may often be inferred from the conduct of the parties," and "from the circumstances surrounding the acts of the parties." (R. 970.) The court further instructed the jury, as requested by the defendant (R. 972):

> * * * the filing of an incorrect Income Tax Return by the taxpayer, is not within itself a violation of the law. It becomes an offense only when intentionally filed, knowing it to be incorrect, and with an intent to evade or defeat the lawful tax due thereon.

Finally, the court gave the jury charge No. 9 requested by the defendant, charging that the word "attempt" contemplated "an affirmative overt act on the part of the Defendant tending to show a design and purpose of wrong doing;" and that it was necessary for the jury to find beyond a reasonable doubt "that an intent existed to defeat or evade a tax * * *." (R. 972-973.)

II

The trial court properly admitted the evidence of which the petitioner complains. The testimony, *inter alia,* of sham stock ownership and office holding and of the purported but deceptive administration of the petitioner's corporations by dummies (R. 999-1000) was clearly admissible, if for no other purpose than to show the petitioner's control over his affairs and knowledge of his fiscal responsibilities. See *United States* v. *Johnson,* 319 U. S. 503, rehearing denied, 320 U. S. 808; *Cooper* v. *United States,* 9 F. 2d 216 (C. C. A. 8th). That some witnesses were in some instances questioned concerning their duties and connections with corporations not involved in the indictment did not impair the admissibility of their testimony; these latter organizations were "subsidiary corporations and companies * * * supposedly formed for the purpose of meeting competition and minimizing corporate tax liability * * *." (R. 999.) Finally, testimony regarding the petitioner's employment of attorneys for "protection" purposes (R. 667) had patent relevance to the question of intent.

III

The trial court's refusal to charge the jury *in haec verba* that the indictment did not constitute evidence does not warrant review. The substance of the requested instruction was covered by the general charge which adequately instructed the

jury that guilt had to be established without reference to the indictment.[3] (R. 968.) The court's reference to the indictment for the monetary particulars of the charges cannot be interpreted as suggesting that the indictment had any probative effect. (R. 970.) Assuming, *arguendo,* that the requested instruction was not covered by the general charge, there is, nevertheless, no patent conflict between the decision of the court below and *United States* v. *Schanerman,* 150 F. 2d 941 (C. C. A. 3d);[4] and, if there were, the decision in the *Schanerman* case would appear to be questionable in view of this Court's later discussion of the so-called harmless error statute[5] in *Kotteakos* v. *United States,* 328 U. S. 750.

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[3] The court charged as follows (R. 968):

> To this indictment the Defendant, Newton Samuel Locke pleads "Not Guilty". The plea of Not Guilty put the burden upon the Government to prove the truthfulness and correctness of the charges contained in said indictment, and the Government must establish such proof to the satisfaction of the Jury, beyond a reasonable doubt; and, unless and until you believe the Government has so established its case, the Defendant is entitled to a verdict of "Not Guilty" at your hands.

[4] Even if the lower court's decision in the instant case had discussed the question whether the trial court had erroneously failed to charge the jury, there would be no conflict with *Cooper* v. *United States,* 9 F. 2d 216 (C. C. A. 8th), as asserted by petitioner. (Br. 14.) The reversal in the latter case rests on a multiplicity of errors.

[5] Section 269 of the Judicial Code, as amended (28 U. S. C. 1940 ed., Sec. 391).

CONCLUSION

The decision below is correct. No important question of law or conflict of decisions is presented. It is respectfully submitted that the petition should be denied.

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